

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

THE CLARK CONSTRUCTION GROUP, INC.,

Plaintiff,

v.

EAGLE AMALGAMATED SERVICE, INC.;
CAPITOL INDEMNITY CORPORATION;
INVESTORS INSURANCE COMPANY OF
AMERICA; FIRST SPECIALTY INSURANCE;
LEXINGTON INSURANCE COMPANY; and
RLI INSURANCE COMPANY,

Defendants.

No. 01-2478 DB

**ORDER DENYING DEFENDANT RLI INSURANCE COMPANY’S
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT
OR IN THE ALTERNATIVE TO STAY**

This matter is before the Court on the motion of Defendant RLI Insurance Company (“RLI”) to dismiss or for summary judgment or, in the alternative, to stay. For the reasons stated herein, RLI’s motion is **DENIED**.

I. Factual Background¹

The following facts are presumed to be true for purposes of the instant motion only. Plaintiff alleges that, in February of 1999, Plaintiff entered into a written contract with the City of Memphis and the Memphis Cook Convention Commission (collectively “the owners”) for the renovation,

¹The factual allegations are taken from the Second Amended Complaint, Defendant’s Statement of Undisputed Facts, and Plaintiff’s Memorandum in Opposition to RLI’s Motion to Dismiss.

expansion, and construction of the Memphis Cook Convention Center in Memphis, Tennessee (the “project”). The project included demolition of the Concourse Hall, a structure attached to the existing convention center.

On or about February 16, 1999, Plaintiff and Eagle Amalgamated Service, Incorporated (“Eagle”), entered into a written subcontract (“subcontract”). Under the terms of the subcontract, Eagle agreed to undertake demolition of the Concourse Hall, as well as other selective demolition and asbestos abatement work at the project site. Eagle was required to purchase insurance and to defend and indemnify Plaintiff against all claims, expenses, damages, and losses arising out of or in connection with the work of Eagle or any of its subcontractors. Eagle purchased the required insurance coverage from Investors Insurance Company of America (“Investors”) and RLI. The Investors policy provided primary insurance up to a limit of \$1 million per occurrence. The RLI policy provided excess coverage of up to \$9 million if the Investors policy is exhausted.

Eagle retained Engineered Demolition, Inc. (“Engineered Demolition”) to assist with demolition of the Concourse Hall. Engineered Demolition was also required to purchase insurance, with Plaintiff as an additional insured on the policies. Engineered Demolition purchased the required coverage from Lexington Insurance Company (“Lexington”), for primary coverage, and First Specialty Insurance, for excess coverage. With its agents and subcontractors, Eagle performed all of the preparatory work associated with the implosion of the Concourse Hall.

On October 10, 1999, Eagle and Engineered Demolition performed the scheduled implosion of the Concourse Hall. This action damaged the adjacent Convention Center. Engineered Demolition employees subsequently left the project site without participating in the complex clean-up efforts necessitated by the unexpected results of their demolition work. Several months later,

Eagle also abandoned the project prior to fulfilling the terms of the subcontract.

On October 11, 1999, the owners informed Plaintiff that they would hold Plaintiff responsible for all costs associated with repairing the damage resulting from the October 10th implosion. On October 12, 1999, Plaintiff notified Eagle, Lexington, First Specialty, Investors, and RLI of the owners' claims and demanded that Eagle and each of the insurers indemnify Plaintiff for its damages and losses arising from the accident. Plaintiff filed an action against the owners, claiming that design problems caused delays and increased costs. The owners filed a counterclaim against Plaintiff, alleging that the accident delayed the project by at least 170 days, increasing the costs of the project, as well as over \$1 million in property damages and extensive clean up costs. Those claims are being litigated in a separate case in this district. (Case number 04-2780).

On June 20, 2001, Plaintiff filed the instant complaint alleging claims against Eagle and the insurers, including RLI. On December 21, 2004, RLI filed a motion to dismiss or for summary judgment or, in the alternative, to stay, alleging that 1) Plaintiff lacks standing to bring a declaratory judgment action against RLI, and 2) Plaintiff's action is not ripe for adjudication. In the alternative, RLI moves the Court to stay the declaratory judgment action pending resolution of the underlying action between Plaintiff and the owners.

II. Analysis²

RLI's motion alleges that Plaintiff does not have standing to maintain a declaratory judgment

²As RLI attached documents to its motion and the Court did not exclude the exhibits in making its decision, the motion will be treated as a motion for summary judgment. Rule 12 of the Federal Rules of Civil Procedure states in pertinent part:

If, on a motion . . . to dismiss . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

action against RLI and that Plaintiff's action is not ripe for adjudication.

A. Standing

RLI first argues that the Court should grant summary judgment as to Plaintiff's declaratory judgment action because Plaintiff lacks standing and, thus, the Court does not have subject matter jurisdiction. Article III, Section 2 of the United States Constitution delineates under what circumstances federal courts will have jurisdiction. Specifically, federal courts can act only when there is a case or controversy. The Declaratory Judgment Act further demands that a controversy be present. "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

RLI argues that Plaintiff has not presented an "actual controversy" because the underlying action that will determine Plaintiff's total liability has not yet been resolved. Until liability has been determined, RLI contends that a declaratory judgment would serve as nothing more than an advisory opinion and would therefore not be appropriate.

There is no concrete definition of an "actual controversy" and the Court must look to the circumstances of the case.

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. . . . As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions" are requisite. This is as true of declaratory judgments as any other field.

McCahill v. Borough of Fox Chapel, 438 F.2d 213, 215 (3rd Cir. 1971) (citing Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

In the instant case, the primary insurer covers the first \$1 million. The owners have already demanded more than \$1 million. The underlying case alleges damages that are significantly higher than that amount. Under the circumstances, it appears likely that Plaintiff will be liable for claims that will trigger coverage by RLI. “[A] declaratory judgment action against insurers, including excess carriers, is permitted prior to judgment [on the underlying claims] where the judgments likely to be recovered in the underlying claims would amount to more than the excess floor or the potential liability might well reach into the excess coverage.” Maryland Casualty Co. v. W.R. Grace & Co., 1996 U.S. Dist. LEXIS 7795 at *7 (S.D.N.Y. 1996) (internal quotations and citations omitted).

RLI correctly noted that the Sixth Circuit has delineated five factors for courts to consider in determining whether a declaratory judgment action would be appropriate:

(1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for res judicata;” (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Grand Trunk Western R.R. Co. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984). As discussed above, an actual controversy exists in the instant case. A declaratory judgment would settle the controversy as to RLI’s coverage. A declaratory judgment would thus clarify the legal relations in issue by determining RLI’s responsibility for Plaintiff’s impending liability. There is no evidence that Plaintiff is merely using the declaratory action for procedural fencing. The fourth factor is not relevant here, as the underlying action is not a state court action. Finally, there is not

an alternative remedy which would better or more effectively resolve the issue.

Therefore, the Court finds that the Plaintiff has standing and the Court has subject matter jurisdiction.

B. Ripeness

RLI next argues that Plaintiff's declaratory judgment action is not yet ripe for adjudication. RLI asserts that the Supreme Court articulated a two-part analysis for determining whether or not a controversy is ripe for judicial resolution. Abbott Laboratories v. Garner, 387 U.S. 136 (1967). In Abbott, drug companies brought an action seeking declaratory and injunctive relief against the Secretary of Health, Education, and Welfare and the Food and Drug Administration. Id. at 138-39. The district court held that regulations issued by the defendants were null and void; the Court of Appeals reversed. The Supreme Court stated that in examining the appropriateness of a declaratory judgment action against administrative agencies, courts should examine the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Id. at 149. However, the Court there was reluctant to grant declaratory judgment because it was being applied to an administrative decision. The "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id. at 148-149. It can be inferred that the Abbott Court delineated more stringent criteria because of its reluctance to interfere with decisions of administrative agencies. Nonetheless, the Abbott Court found that declaratory judgment was appropriate there.

In the instant case, no administrative policies are at issue. Nevertheless, as discussed

previously, there is a controversy fit for judicial decision. RLI would not be prejudiced by allowing the declaratory action to proceed. Although semantically different, RLI's ripeness arguments are the same as its arguments for standing. As the Court already determined that an actual controversy is present, the Court holds that the questions at issue here are ripe for adjudication. Furthermore, whether or not to grant declaratory relief is at the discretion of the Court. Id. at 148. Accordingly, the Court DENIES RLI's motion for summary judgment.

C. Stay

RLI contends that if the Court decides that summary judgment should not be granted, the suit should be stayed pending resolution of the underlying action. However, the Court has already determined that this declaratory judgment action is ripe for adjudication. Therefore, a stay would be unnecessary and inappropriate. Accordingly, the Court denies RLI's motion for a stay.

III. Conclusion

For the foregoing reasons, Defendant RLI's motion to dismiss is **DENIED**.

IT IS SO ORDERED this _____ day of March, 2005.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE